VIRGINIA LAW REGISTER.

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MISCELLANEOUS NOTES.

As we go to press, the reports from the bedside of Judge Burks, editor of this journal, indicate that before this issue reaches our readers, his long and useful life will be but a memory, and a precious heritage of the law that he so much loved. When we contemplate such a calamity, the questions uppermost in our mind are, who shall estimate his loss to the profession of this State, and who shall fill the unique position he has for so many years sustained, as the mentor of the courts and lawyers of Virginia?

THE HAPPY ESTATE OF THE FIN DE SIECLE FEME COVERT.—"The married woman is now making the best of two worlds—the disabilities of her former state of subjection, and the privileges of her emancipation."—*Sir F. Pollock, in Law Quarterly Review, Jan., 1897.*

THE right of a widow to remove her husband's body from a cemetery lot owned by his daughter, in which he was buried by his own request, is denied in *Thompson* v. *Deeds* (Iowa), 35 L. R. A. 56, if the only reason for removal was their disagreement respecting a monument and the care of the grave. The widow is held entitled to erect a suitable monument to him on that lot, but not to place on it any reference to the daughter or her first husband, who was buried on the lot, or to erect a coping around the lot. The court allowed both parties to decorate the grave with flowers, but recommended them to exercise a little Christian charity.

TEACHING PRACTICE IN LAW SCHOOLS.—"Around the great writs have crystallized the rights of the subject. Procedure is the skeleton of our jurisprudence. When we dispense with the study of common law procedure, we shall also dispense with the knowledge of the common law. . . The intrinsic difficulty of teaching procedure but emphasizes the necessity of teaching it, for the learning is as indispensable as it is hard to obtain. It is the crooked places the teacher is called upon to make straight, and the rough places plain."—*Prof. Blewett Lee, of the Law School of the Northwestern University, in paper read in 1896 before the Section of Legal Education of the American Bar Association.*

REORGANIZATION OF THE LAW SCHOOL OF WASHINGTON AND LEE UNIVERSITY.—This has been rendered necessary by the lamented death of Prof. John Randolph Tucker, and the retirement of Assistant Professor John W. Davis, who, after a year of most successful work as a teacher, returns to the practice of his profession. The chair of Equity and Commercial Law, and of Constitutional and International Law, made vacant by the death of Prof. Tucker, has been filled by the election of his son, Hon. Henry St. George Tucker, a Master of Arts of Washington and Lee University, and a graduate of the Law School in the class of 1875-'76. Henry St. George Tucker is still a young man, and was in successful practice at Staunton, Va., when he was elected to Congress, where he served for eight years. His brilliant and patriotic career in the House of Representatives is well known to our readers.

Wm. Reynolds Vance, of Kentucky, a graduate in the Law School in the class of 1896-'97, was elected Assistant Professor of Law. Mr. Vance had previously received from Washington and Lee University the degrees of Master of Arts and Doctor of Philosophy, and has had several years experience as a teacher.

Prof. Charles A. Graves was elected Dean of the Law School.

THE VIRGINIA STATE BAR ASSOCIATION.—The ninth annual meeting of the Association will be held at the Hot Springs of Virginia, on Tuesday, Wednesday, and Thursday, August 3d, 4th and 5th, 1897.

TUESDAY MORNING.

The President's Address, by W. W. Henry, of Richmond, entitled "The Trial of Aaron Burr for Treason."

TUESDAY EVENING.

A Paper by W. P. McRae, of Petersburg, entitled "Legislation Since the Code."

WEDNESDAY MORNING.

A Paper by A. P. Staples, of Roanoke, entitled "Something about the Law of Usury."

WEDNESDAY EVENING.

New and Miscellaneous Business.

THURSDAY MORNING.

The Annnal Address, by Woodrow Wilson, of Princeton, N. J., entitled "Leaderless Government."

THURSDAY EVENING.

Annual Banquet, beginning at 8:30 P. M.

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93 VA.—"Reports of Cases in the Supreme Court of Appeals of Virginia. By Martin P. Burks, State Reporter. Vol. XCIII. From April 2, 1896 till November 19, 1896."

This is the third volume of Reports prepared by Mr. Burks, and it shows the intelligent and painstaking work which has characterized its predecessors, and elicited favorable comment from the Bench and Bar.

Although 93 Va. is stated on the title page to report decisions "From April 2, 1896, till November 19, 1896," yet there is an appendix, containing a number of important cases decided earlier, and which regularly would have appeared in 91

or 92 Va. We presume that these cases have only recently be n directed by the court to be reported. They have, up to this time, been accessible to the profession in the *Southeastern Reporter* only; and we are glad to see them given a place in the official reports.

It would seem, indeed, that the presumption is strong in favor of including in the Reports any case involving questions of such doubt or difficulty that the Court of Appeals has seen fit to grant therein a writ of error or an appeal; and that exclusion should be the rare exception. When the court deems the question well settled by its own former decisions, these might be referred to without further discussion. And cases involving questions of fact only, the evidence being conflicting, might be omitted altogether.

93 Va. contains the "Rules and regulations for licensing persons to practice law in Virginia," which were printed in 2 VIRGINIA LAW REGISTER, 910. It also contains, we regret to say, a table of *errata*, a feature which was noticeable in Vol. 91, but was happily absent from Vol. 92. We trust it may grow "small by degrees and beautifully less," until it shall disappear altogether.

C. A. G.

PUBLIC DEFENDERS.—"Mrs. Clara Foltz, of the New York Bar, is firmly convinced that there is at least one serious defect in our judicial system. While the criminal court is admirably equipped with machinery for the prosecution of offences, it is lamentably deficient, she believes, in the machinery for defence. The unfortunate prisoner who is unable to pay for counsel must expect to be prosecuted by the ablest of attorneys, backed up by all the resources of the State, and only too frequently to be defended, if at all, by a court appointee, who is wholly inferior to the men with whom he must cope. The remedy for this Mrs. Foltz finds in the creation of a new officer, to be called the Public Defender. She has formulated her ideas in a bill which is to be laid before the legislature of New York. It provides for the election to the office of an attorney at law in each county, whose duty it shall be 'to attend all criminal courts, and to appear for and defend all persons charged with violation of the law who are without counsel and who desire an attorney to appear for them.'

"While an impecunious prisoner, whose case is tried in one of the smaller towns, where it will become matter of common talk among lawyers, is not likely to suffer for want of competent counsel to defend him, it is apt to be different amid the hurry and bustle of litigation in the large cities, where such thing pass by unnoticed. Even there it may perhaps be doubted if substantial injustice is often done a prisoner under the present system. If he is not adequately represented by counsel, the average judge is likely to guard his interests well enough, if not to err on the side of leniency. It is an unpleasant position for the judge, however, and of course involves a departure from the strictly judicial function. Mrs. Foltz's idea certainly merits consideration."—*Harvard Law Review*, April, 1897.

WORK OF THE VIRGINIA LAW SCHOOLS FOR 1896-97.—During the session of 1896-97, there were in attendance upon the three Virginia Law Schools two hundred and nine students, of whom thirty-six were matriculated at Richmond College, fifty-four at Washington and Lee University, and one hundred and nine-

teen at the University of Virginia. The number of graduates with the degree of Bachelor of Law was forty-eight—of whom six received the degree at Richmond College, twenty-three at Washington and Lee University, and nineteen at the University of Virginia. At Richmond College one only completed the course in a single session; at Washington and Lee nine performed this feat; at the University of Virginia one only. At Richmond College, out of fourteen applicants for the degree, six only were successful—a result accounted for in part by the fact that a large number of the students are engaged in business in the city (the lectures being held in the afternoon), and were unable, therefore, to devote their entire attention to their legal studies.

It is gratifying to see that each of the three Law Schools is extending its course of instruction, and thus increasing the difficulty of its completion in a single session, with a view to making two years attendance the rule for those who desire to obtain the degree of Bachelor of Law. We have not before us the catalogue of Richmond College for 1896-97 (we believe it has not been issued), but that of Washington and Lee University contains this statement: "As the course is now taught, it is intended to be taken in two years; and students who desire to obtain the degree [of Bachelor of Law] are not advised to attempt it in less time—unless, indeed, they have already, by private study or attendance on some other law school, a considerable knowledge of law. . . But to take the whole course in one year requires attendance on lectures four hours each day (twenty-four hours a week); and the Moot Court work in the afternoon is in addition to this." And the statement of the catalogue of the University of Virginia is still stronger: "The fact is emphasized that since the reorganization of the department, and the very considerable enlargement of the course of study, it is practically impossible to complete the work, as had not been unusual before, in less than two years. Students who can attend but a single session are earnestly advised to take special courses, which the arrangement of the classes readily permits."

Since writing the above we have learned that the following resolutions concerning the Law Department of the University of Virginia were adopted by the Visitors, at their recent meeting, on the recommendation of the Faculty, and now constitute the rule as to graduation in the Law School:

Resolved, First. That the Faculty recommend to the Visitors that after the session of 1896–97 no student be graduated in the Law Department who has not attended two full sessions of the law school.

"Second. That the Law Faculty be authorized to accept, in lieu of one year of such attendance, certificates of attendance and of work satisfactorily performed at other approved law schools, provided, that in order to obtain the degree each student must have passed a satisfactory examination here upon all the subjects embraced in the law course of the University.

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SPECIAL LEGISLATION IN VIRGINIA.—The prevalence of special legislation in the United States is lamented by Moorfield Storey in his address in 1896 as President of the American Bar Association, and Virginia is referred to as an offender in this respect. The criticism is just. No one can read our recent "Acts" without perceiving the tendency to legislate for counties or groups of counties, and not for the State at large. Perhaps the most localized of local statutes is found in

Acts 1895–'96, p. 465, c. 435, entitled "An Act to prohibit the running at large of sheep in a certain district of Prince William county"—which declares "That it shall be unlawful for any sheep to run at large beyond the limits of their owner's or manager's lands within the following boundary: Beginning at the railroad bridge over Broad Run in said county, and thence down said Broad and Occoquan Runs to the junction of Occoquan and Bull Run; thence up the said Bull Run to the Southern railroad bridge; thence with said railroad to the beginning." If this sort of thing continues, we may expect a special Act to protect A's garden against the incursion of B's fowls, or A's backyard from the prowling of B's dog.

With reference to the game laws, a glance at the Index of the Acts of 1895–'96, title "Game," will show how special the legislation is on this subject. But we wish to call attention to a mode of legislating which is found on p. 829, c. 748, entitled, "An Act to amend and re-enact an Act approved February 28, 1894, to regulate the killing or capturing of game in the counties of Alleghany, Bath, Highland, and Augusta." On an examination of this Act, it will be found that the principal change is to add *the county of Rockbridge* to the group of four counties named in the Act of February 28, 1894.

The question may well arise whether the Act of March 4, 1896, satisfies the requirement of the Constitution of Virginia, Art. V, sec. 15, which declares that "no law shall embrace more than one object, which shall be expressed in its title." See *Cahoon* v. *Iron Gate, &c. Co.*, 92 Va. 367, where the court quotes with approval this language of Judge Lewis in *Board of Supervisors, &c.* v. *Magruder*, 84 Va. 832: "The provision is a wise one, of great public utility, and embodied in the Constitution of many of our sister States. Its object is to prevent surprise in legislation, by having the title of every Act clearly express the object of the enactment, so that neither the members of the legislature nor the people will be misled." The title to the Act of March 4, 1896, is certainly misleading; for any one would naturally suppose that the purpose of the later statute was only to make *new regulations* as to the killing and capturing of game in the counties of Alleghany, Bath, Highland, and Augusta, and not to add a *new and unnamed county* to which the old regulations are extended. But if the title to the Act of March 4, 1896, be constitutional, then it is certain that the index to the Session Acts must be enlarged, or "the people will be misled." That act made it unlawful to kill or capture at any time the red-breasted robin in the county of Rockbridge. Now one may search the index to Acts of 1895–'96, and never be aware of this fact. Under "Rockbridge County," in the index, the only references are "New Roads, &c., in," and "Bond of Treasurer of;" under "Game," Rockbridge county is not named; and nowhere in the index is there any reference to "Robins," red-breasted or otherwise. The reason is obvious. The index follows the title to the Act of March 4, 1896, and so, under "Game," gives simply "to regulate the killing, &c. of, in Alleghany, Bath, Highland, and Augusta." As the title does not name "Rockbridge," the index ignores it; and as "Robins" are not mentioned in the title, neither are they mentioned in the index. It would seem that a proper index should be based upon a perusal of the body of the statutes; and that it should descend to details, so that when a statute forbids the killing of robins in Rockbridge county that fact could be discovered in the index under at least two titles, viz: "Rockbridge county," and "Robins."

CHARGING THE JURY.—"The numerous comments made in newspapers and legal periodicals upon the charge to the jury in the trial of the Bram murder case, and upon the opinion of the court on refusing a new trial, bring into notice the marked difference in practice between the Federal courts and most State courts with respect to the judge's commenting upon the evidence in the charge. There can be little doubt that the charge in this case was entirely unexceptionable, according to the rule laid down in the Federal courts. Following the established English rule, the Supreme Court of the United States has often held that it is proper for the judge, and sometimes even incumbent upon him, to express in his charge to the jury his own opinion of the weight of the evidence that has been offered, and of the facts which he considers it to prove, provided always that he clearly instructs the jury that the determination of all questions of fact is left to their own independent judgment. In almost all State jurisdictions, on the other hand, an increasing jealousy of the possible influence of the judge upon the jury's verdict has by various means made any expression of opinion by the judge upon questions of fact a ground for exceptions. In several States, such as Arkansas, California, Nevada, South Carolina, Tennessee, and Washington, any comment upon the evidence by judges in charging a jury, is prohibited by the State Constitution. In very many other States, of which Massachusetts is one, the same result is reached by a statute. To allow exceptions upon such grounds, in the absence of any statutory provision, would seem to be an unwarrantable departure from the old common law view, which was that it was the duty of the judge to assist the jury in the determination of matters of fact by his advice, founded on his extensive experience and his superior training in habits of logical thought. How positive and urgent such advice may be, when the jury are at the same time instructed that the final decision is left entirely to their judgment, is a question which must always depend to some extent on the temper of the courts, and of the community in which they administer justice; and accordingly even the Federal courts are more inclined to restrict the action of the judges in this respect than are the English courts. The effect of the statutes referred to is to prevent the court from in any way aiding the jury in the determination of matters of fact, and to render it extremely difficult for a judge to sum up the evidence without laying his charge open to exceptions. It is certainly the opinion of many lawyers that juries are more apt to go wrong in their verdicts under this rule of practice than under the rule of the Federal and of the English courts. It would perhaps be well for those who are anxious for the preservation of the jury system, at a time when much dissatisfaction is felt with its practical operation, to consider whether the danger of judges influencing juries to give unjust verdicts is so serious as to make it advisable to diminish the practical efficiency of jury trials by preventing the judge from giving the jury the benefit of his generally superior powers of reasoning and wide experience in the facts of cases."—*Harvard Law Review*, May, 1897.

As to the right of Federal courts to express opinions to the jury on questions of fact, see *Simmons* v. *United States*, 142 U. S. 148, where the law is laid down as follows: "The only other exception argued is to the statements made by the judge to the second jury, in denying their request to be discharged without agreeing upon a verdict, that he regarded the testimony as convincing. But at the outset of his charge he had told them in so many words that the facts were to be decided

by the jury and not by the court. And it is so well settled by a long series of decisions of this court, that the judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination, that it is only necessary to refer to two or three recent cases in which the judge's opinion on matters of fact was quite as plainly and strongly expressed to the jury as in the case at bar. *Vicksburg &c. R. Co.* v. *Putnam*, 118 U. S. 545; *United States* v. *Philadelphia &c. R. Co.*, 123 U. S. 113; *Lovejoy* v. *United States*, 128 U. S. 171."

On the other hand, the law of Virginia is thus laid down: "It is elementary and firmly settled in Virginia that the court responds to questions of law and the jury to questions of fact. The court must decide on the admissibility of evidence, that being a question of law; but not as to its weight after it is admitted, that being a question of fact. The decided cases evince a jealous care to watch over and protect the legitimate powers of a jury. They show that the court must be very careful not to overstep the line which separates law from fact. They establish the fact that when evidence is *parol*, any opinion as to the weight, effect, or sufficiency of the evidence submitted to the jury, any assumption of a fact as proved, will be an invasion of the province of the jury. For making observations or instructions to the jury as to the weight to be given by them to any part of the testimony or the whole evidence, the cause may be reversed, and a new trial awarded." *Tyler* v. *Chesapeake &c. R. Co.*, 88 Va. 389.

It is probable that in no State in the Union is the presiding judge during a trial by jury more passive than in Virginia. As has been stated, he can express no opinion on the weight of the evidence; he does not charge the jury or sum up the evidence; and, as a rule, he does not even give instructions as to the law unless requested so to do by counsel. *De Jarnette's Case*, 75 Va. 867, 877. The judge cannot order a *non-suit*. 4 Min. Ins. (3d. ed.), 958. It is only upon a demurrer to evidence, or, or after verdict on a motion for a new trial, that the Virginia judge is roused to activity. The greater control exercised by Federal courts over juries is no doubt one of the reasons for the decided preference which corporations evince for these tribunals, and for their anxiety to avoid, if possible, trial by jury in the State courts.